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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

AMERISURE INSURANCE COMPANY, a)
Michigan Corporation and AMERISURE)
MUTUAL INSURANCE COMPANY, a)
Michigan Corporation,)

CASE NO.:
DEPT NO.:

Plaintiffs,

-vs-

SUMMIT CONTRACTORS, INC., dba)
SUMMIT SOUTHWEST, INC.; THE EDGE)
AT RENO CONDOMINIUM UNIT-)
OWNERS ASSOCIATION, INC.; THE)
EDGE AT RENO, LLC; THE UNIVERSITY)
HOUSING GROUP, INC., and CRUM &)
FORSTER SPECIALTY INSURANCE)
COMPANY,)

**COMPLAINT FOR DECLARATORY
RELIEF**

Defendants.

COMES NOW, Plaintiffs, AMERISURE INSURANCE COMPANY and AMERISURE
MUTUAL INSURANCE COMPANY (herein collectively "Amerisure" or "Plaintiffs"), by and

1 through undersigned counsel, and files their Complaint for Declaratory Judgment pursuant to 28
 2 U.S.C. § 2201, against Defendants, SUMMIT CONTRACTORS, INC., dba SUMMIT
 3 SOUTHWEST, INC. (herein “Summit” or “insured”), THE EDGE AT RENO CONDOMINIUM
 4 UNIT-OWNERS ASSOCIATION, INC. (herein “Unit-Owners Association” or “underlying
 5 plaintiff”), THE EDGE AT RENO, LLC., THE UNIVERSITY HOUSING GROUP, INC.
 6 (collectively herein “cross-claimants”), and CRUM & FORSTER SPECIALTY INSURANCE
 7 COMPANY, and in support thereof states as follows:
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 9

10 I.

11 **NATURE OF ACTION AND RELIEF SOUGHT**

- 12 1. This action seeks declaratory relief pursuant to 28 U.S.C. § 2201 and 2202.
- 13 2. The Plaintiffs seek a declaration that they owe no duty to defend or indemnify
 14 Defendant Summit under policies of liability insurance issued by Amerisure in connection with
 15 an underlying lawsuit styled *The Edge At Reno Condominium Unit-Owners Association, Inc., et*
 16 *al., v. The Edge At Reno, LLC, et al.*, Case No. CV08-03304, which is currently pending in the
 17 Second Judicial District court for the State of Nevada, County of Washoe (herein “*Unit-Owners*
 18 *lawsuit*” or “underlying lawsuit”).
- 19 3. There is clearly an actual, present and *bona fide* controversy between the parties
 20 with respect to Amerisure’s coverage obligations to defend and/or indemnify Summit as
 21 defendant in the underlying lawsuit for potential liability to the *Unit-Owners* Association.
 22
 23 4. Amerisure’s rights and duties pursuant to the policy are dependent upon this
 24 Court’s interpretation of the policy’s terms, conditions, limitations, provisions, exclusions and
 25 endorsements.
 26
 27 5. The adverse parties are all before the court by proper process.
 28

II.

PARTIES

6. At the time of the commencement of this action, Plaintiff Amerisure Insurance Company was an insurance company organized and existing under the laws of the State of Michigan. At the time of filing this action, Amerisure Insurance Company's principal place of business was Farmington Hills, Michigan.

7. At the time of the commencement of this action, Plaintiff Amerisure Mutual Insurance Company was an insurance company organized and existing under the laws of the State of Michigan. At the time of filing this action, Amerisure Mutual Insurance Company's principal place of business was Farmington Hills, Michigan.

8. At the time of the commencement of this action, Defendant Summit was a for profit corporation, organized under the laws of the State of Florida, whose principal place of business was located in Jacksonville, Florida with an address of 2110 Herschel Street, Jacksonville, Florida 32204.

9. At the time of the commencement of this action, Defendant The Edge At Reno Condominium Unit-Owners Association, Inc. was a non-profit mutual benefit corporation, incorporated under the laws of the State of Nevada, with its principal place of business in Washoe County, Nevada.

10. At the time of the commencement of this action, Defendant The Edge At Reno, LLC was a limited liability company, organized under the laws of the State of Nevada, with its principal place of business located in Washoe County, Nevada.

11. At the time of the commencement of this action, Defendant The University Housing Group, Inc. was a corporation, organized and existing under the laws of the State of

1 Virginia.

2
3 12. Upon information and belief, at the time of the commencement of this action,
4 Defendant Crum & Forster Specialty Insurance Company (herein "Crum & Forester") as a
5 corporation organized under the laws of the State of Delaware and with its principal place of
6 business in Morristown, New Jersey.

7
8 13. No specific relief is requested against Defendants Unit-Owners Association and
9 Cross-Claimants, who have been joined in an effort to bind them to any resulting judgment and
10 because they are plaintiffs and cross-claimants, respectively, in the underlying lawsuit, and thus
11 necessary parties to this action. Should these Defendants stipulate to be bound by the declaration
12 of rights herein, Amerisure will consider dismissing them from this matter.

13
14 14. No specific relief is requested against Defendant, Crum & Forester, who has been
15 joined because it also provided Commercial General Liability coverage to Summit Contractors,
16 Inc., under the following policies: GLO 090899 (effective from 9/20/05 to 9/20/06); GLO 091290
17 (effective 9/20/06 to 9/20/07); GLO 101450 (effective 9/20/07 to 9/20/08); and GLO 131243
18 (effective from 9/20/08 to 9/20/09);¹ and thus, should be included in and bound by any resulting
19 judgment in this matter. Should this Defendant stipulate to be bound by the declaration of rights
20 entered in this matter, Amerisure will consider dismissing it from this matter.

21 22 III.

23 JURISDICTION AND VENUE

24 15. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332,
25 because there is complete diversity of citizenship between the parties, and because the amount in
26

27
28 ¹ Amerisure sought copies of such policies from Defendant, Crum & Forster. However, Crum &
Forster refused to provide the subject policies. See Exhibit A.

1 controversy, exclusive of interest and costs, exceeds the sum of \$75,000.

2
3 16. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 (a) and (c).

4 IV.

5 **BACKGROUND**

6 **A. THE CONSTRUCTION OF THE PROJECT**

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8 17. On information and belief, Summit entered into a contract for the construction of
9 the Edge At Reno Condominium Community (herein "the subject property") on March 30, 2004.
10 On information and belief, construction began at the subject property in April of 2004.

11 18. The subject property is a multi-family development located at 200 Talus Way,
12 Reno, Nevada. The subject property consists of four separate dwelling structures and a common
13 recreation building.

14
15 19. On information and belief, certificates of occupancy relating to the subject
16 property were issued in November, 2005 for the first four buildings, and on December 1, 2005 for
17 the fifth building.

18 20. Visual inspections and destructive testing at the subject property took place in
19 May, 2007. *See* Exhibit "A", a true and correct copy of the January 14, 2008, Chapter 40 Notice.
20

21
22 21. On or about January 14, 2008, The Edge at Reno Condominium Unit-Owners
23 Association, Inc., on behalf of itself and its individual unit owners served its NRS Chapter 40
24 Notice of Claims (NRS 40.645) upon all developers, builders, declarants, contractors, and
25 subcontractors. *See* Exhibit "B".

26
27 **B. THE UNIT-OWNERS' LAWSUIT**

28 22. The *Unit-Owners* Association is the plaintiff in the underlying lawsuit filed in the

1 Second Judicial District Court for the State of Nevada, County of Washoe, which seeks amounts
2 allegedly attributable to the defective construction at the subject property. A true and correct copy
3 of the Unit-Owners' First Amended Complaint is attached as Exhibit "C".
4

5 23. The *Unit-Owners'* First Amended Complaint alleges that prior to filing the initial
6 complaint, on or about January 24, 2008, the Unit-Owners Association delivered to defendants in
7 the underlying lawsuit a Written Notice of Claims and a list of known or identified defects
8 together with a report executed by the expert contractor who performed inspections on the subject
9 property. *See* Exhibits "B" & "C".
10

11 24. The *Unit-Owners* Association alleges that, in connection with filing the Notice of
12 Claims, it retained an expert who conducted "visual inspections that have taken place at various
13 times and destructive testing, which occurred in May 2007" at the subject property. *See* Exhibit
14 "B", Attachment 3.
15

16 25. As a result of the expert's visual and invasive testing, the *Unit-Owners'* First
17 Amended Complaint alleges the existence of damages including, but are not limited to: "structural
18 failures and damage, moisture intrusion and interior staining; spalling and deterioration of slabs,
19 shear walls, post-tensioned slabs, footings and slabs on grade; stucco cracking, brick veneer
20 separation, sidewalk deterioration; deterioration, crumbling, staining and efflorescence damage to
21 the exterior walls, differential settlement in expansion joints; missing or inadequate fire stopping;
22 failure of drainage, waterproofing and moisture intrusion at balcony decks, windows and building
23 exterior envelope; spalling stucco; deterioration and cracking of concrete at building exterior,
24 failure of unit decks and corridor decks; failure of building EFIS system; failure of wall systems;
25 failure of roofing systems, doors, handrails, waterproofing, planters, landscape, deck drains,
26 caulking, retaining walls, stairs, concrete flatwork, driveways, interior finishes, landing
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1 elevations, pool, pool cracks, pool deck cracks, masonry and segmented retaining walls, HVAC
2 systems, mechanical systems, plumbing systems, fire proofing systems, fire alarms system, fire
3 escape routes and exits, paving, electrical systems, and such other matters as are reported by
4 Plaintiff's experts in their current Preliminary Statement of Defects." See Exhibit "C", ¶ 28, &
5 Exhibit "B", attachments 1 & 2.
6

7
8 26. The *Unit-Owners* Association maintains that it "only became sufficiently aware of
9 the defects and damages...through damage that arose after the time of purchase and as a result of
10 complex inspections and intrusive testing performed by expert consultants." See Exhibit "C", ¶
11 33).

12
13 27. The *Unit-Owners*' First Amended Complaint alleges that "due to said defects and
14 deficiencies, and resulting damages, the [s]ubject [p]roper[t]y has been adversely impacted so as
15 to diminish the function, value, marketability, habitability and saleability...thereby affecting and
16 interfering with health, safety, and welfare of the [Unit-Owners Association] and its members,
17 and their use, habitation and peaceful and quiet enjoyment." See Exhibit "C", ¶ 32.

18
19 28. All damages alleged in the *Unit-Owners*' First Amended Complaint arose after the
20 time of purchase of the subject property and first manifested at the time of the expert's
21 inspections and testing, which occurred in May of 2007.

22
23 29. On March 23, 2009, The Edge At Reno, LLC, The Bradley Companies, Inc., and
24 University Housing Group, Inc. filed a cross-claim against Summit seeking indemnity and/or
25 contribution to the extent the cross-claimants are found liable in the underlying lawsuit. A true
26 and correct copy of the cross-complaint is attached as Exhibit "D".

27 ///

28 ///

C. THE AMERISURE POLICIES

1. Amerisure Primary Policy No. GL 2005207030004

30. Amerisure issued policy number GL 2005207030004 to Summit, which includes a Commercial General Liability coverage part and was effective from December 31, 2004 to September 20, 2005 (herein "Amerisure Primary Policy").² A true and correct copy of the Amerisure Primary Policy is attached as Exhibit "E".

31. Summit completed and filed its application for the Amerisure Primary Policy in Florida.

32. Summit engaged the service of Construction Insurance Corp., a Florida producer, to negotiate the terms and conditions of the Amerisure Primary Policy.

33. All negotiations relative to the procurement of the Amerisure Primary Policy took place in Florida.

34. Amerisure issued and delivered the Amerisure Primary Policy to Summit in Florida.

35. Summit paid premiums, relative to the Amerisure Primary Policy, in Florida.

36. The Amerisure Primary Policy affords coverage, subject to the terms and conditions of the policy, for Summit's operations in Florida and elsewhere.

37. The Commercial General Liability Coverage Part of the Amerisure Primary Policy states in relevant part:

SECTION I - COVERAGES

**COVERAGE A. BODILY INJURY AND PROPERTY
DAMAGE LIABILITY**

² While originally written to be effective until December 31, 2005, Amerisure Primary Policy was cancelled effective September 20, 2005.

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1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply....

* * *

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

- b. This insurance applies only to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period...

* * *

See Exhibit "E", Section I, pg. 1 of 16.

38. The Amerisure Primary Policy includes the following endorsements:

**CONTRACTORS PROFESSIONAL SERVICES LIABILITY COVERAGE
ENDORSEMENT**

This endorsement modifies the insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

* * *

By the addition of this endorsement to your policy, your coverage is extended to provide Contractor Professional Services Liability Coverage subject to the provisions which follow. This coverage is added to or amends specified **SECTION(S)** in the **COMMERCIAL GENERAL LIABILITY COVERAGE FORM** contained in your policy. All other terms and conditions of the

COMMERCIAL GENERAL LIABILITY COVERAGE FORM apply to the coverage afforded in this endorsement, except those sections amended specifically in this endorsement. THE COVERAGE, TERMS AND CONDITIONS IN THIS ENDORSEMENT APPLY ONLY TO CONTRACTORS PROFESSIONAL SERVICES LIABILITY COVERAGE.

1. **SECTION I – COVERAGES** is amended as follows:

1. The following exclusion is added to **SECTION I – COVERAGES A AND B:**

This insurance does not apply to “bodily injury”, “property damage”, “personal injury” or “advertising injury” arising out of the rendering or failure to render any professional services by or for you, including:

- (1) The preparing, approving, or failing to prepare or approve maps, drawings, opinions, plans, reports, analyses, surveys, change orders, designs or specifications; and
- (2) Inspection or engineering services.

2. The following is added to **SECTION I – COVERAGES:**

COVERAGE E. – CONTRACTORS PROFESSIONAL SERVICES LIABILITY COVERAGE

1. **Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages arising out of any “negligent act” committed by the insured, or on behalf of the insured to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages. However, we will have no duty to defend the insured against any “suit” seeking damages for any “negligent act” to which this insurance does not apply....

* * *

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under

**SUPPLEMENTARY PAYMENTS –
COVERAGES A, B AND E.**

b. This insurance applies only if the damages arise out of a “negligent act” that:

(1) Takes place in the “coverage territory”; and

(2) Occurs during the policy period.

* * *

See Exhibit “E”, Endorsement No. C.

39. The Amerisure Primary Policy contains the following Definitions:

SECTION V – DEFINITIONS

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. “Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

* * *

22. “Your work”:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

* * *

"Construction Management Services" means the providing of construction expertise in the form of recommendations to the owner and design professional(s) during the planning and design phases, the scheduling of construction and the overall coordination of the separate prime contractors during the construction phase. (as added by Endorsement No. C)

"Contractors Professional Services" means the professional services that are necessary and incidental to the conduct of your contractor business described. (as added by Endorsement No. C)

"Design Services" means preparing or approving maps, drawings, opinions, plans, reports, analyses, surveys, change orders, designs or specifications, inspection and engineering services performed by or on behalf of the insured or others in the capacity as described in the above Schedule. (as added by Endorsement No. C)

"Negligent Act" means an error or omission by the insured arising out of the performance of or failure to perform "Contractors Professional Services", including "Design Services" and "Construction Management Services." (as added by Endorsement No. C)

* * *

2. Amerisure Umbrella Policy No. CU 1316446

40. Amerisure issued policy number CU 1316446 to Summit, which follows form to the primary policy and has an effective period running from December 31, 2004 to September 20,

2005 (herein “Amerisure Umbrella Policy”).³ A true and correct copy of the Amerisure Umbrella Policy is attached as Exhibit “F”.

41. Summit completed and filed its application for the Amerisure Umbrella Policy in Florida.

42. Summit engaged the service of Construction Insurance Corp., a Florida producer, to negotiate the terms and conditions of the Amerisure Umbrella Policy.

43. All negotiations relative to the procurement of the Amerisure Umbrella Policy took place in Florida.

44. Amerisure issued and delivered the Amerisure Umbrella Policy to Summit in Florida.

45. Summit paid premiums, relative to the Amerisure Umbrella Policy, in Florida.

46. The Amerisure Umbrella Policy affords coverage, subject to the terms and conditions of the policy, for Summit’s operations in Florida and elsewhere.

47. The Amerisure Umbrella Policy states in relevant part:

A. COVERAGES

2. Insuring Agreement

a. We will pay on behalf of the insured those sums that the insured becomes legally obligated to pay as damages which exceed the limit of “underlying liability insurance” or the “self-insured retention” because of:

(1) “Bodily injury”,

(2) “Property damage” or

(3) “Personal and advertising injury”

³ While originally written to be effective until December 31, 2005, the Amerisure Umbrella Policy was also cancelled effective September 20, 2005.

Caused by an "occurrence" to which this insurance applies.

- b. This insurance applies to "bodily injury", "property damage", and "personal and advertising injury" only if:

* * *

- (2) The "bodily injury", "property damage", and "personal and advertising injury" occurs during the policy period; and ...

* * *

See Exhibit "F", Section A, pg. 1 of 17.

48. The Amerisure Umbrella Policy contains the following Definitions:

E. DEFINITIONS

13. "Occurrence" means:

- a. For "bodily injury" and "property damage", an accident, including continuous or repeated exposure to substantially the same general harmful conditions resulting in "bodily injury" or "property damage, or...

* * *

19. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of sue of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it...

* * *

23. "Underlying liability insurance" means:

- a. Policies listed in the Schedule of Underlying Insurance.
- b. Insurance coverage available to the insured under another insurance policy applicable to the:
 - (1) Claim made or "suit" brought; or
 - (2) "Occurrence"; or
- c. The "self-insured retention" when a. or b. above do not apply.

* * *

See Exhibit "F", Section E, pg. 17 of 17.

D. AMERISURE'S COMMUNICATION WITH SUMMIT

49. On April 29, 2008, Amerisure acknowledged receipt of the Notice of Claim concerning alleged defective construction at the subject property. Amerisure stated that the information it possessed indicated that the alleged defective construction and the first awareness of the alleged damage came during destructive testing performed in May 2007. Further the April 29, 2008 letter included references to certain Amerisure Primary Policy's provisions and exclusions upon which Amerisure had reserved its rights to deny coverage. A true and correct copy of the April 29, 2008 letter is attached as Exhibit "G".

50. On March 9, 2009, Amerisure issued a reservation of rights letter acknowledging receipt of Summit's February 24, 2009 tender of the *Unit-Owners'* lawsuit and agreeing to undertake the defense of the *Unit-Owners'* lawsuit subject to a reservation of rights. The March 9, 2009 letter included citations to specific Amerisure Primary Policy's provisions and exclusions upon which Amerisure reserved its rights to deny coverage – specifically noting that "damage which occurs after the policy effective dates would not be covered under [the Amerisure Primary Policy]." A true and correct copy of the March 9, 2009 letter is attached as Exhibit "H".

1 51. On May 8, 2009, Amerisure issued an amended reservation of rights letter to
2
3 Summit indicating that there remain questions as to whether the Amerisure Primary Policy would
4 provide coverage for the Unit-Owners' lawsuit, as the alleged damages apparently occurred after
5 the Amerisure Primary Policy had elapsed. A true and correct copy of the May 8, 2009 letter is
6 attached as Exhibit "I".

7 COUNTS FOR DECLARATORY JUDGMENT AGAINST SUMMIT

8 COUNT I

9 (NO "PROPERTY DAMAGE" AND/OR "BODILY INJURY" 10 WITHIN THE AMERISURE POLICY PERIOD)

11 52. Amerisure incorporates the allegations set forth within Paragraphs 1 through 51 as
12 if fully set forth herein.

13 53. The Coverage A insuring agreement of the Amerisure Primary Policy states that
14 Amerisure "will have the right and duty to defend the insured against any 'suit' seeking ['bodily
15 injury' or 'property damage,']" but only if the "bodily injury" and/or "property damage" "is
16 caused by an 'occurrence'..." and "occurs during the policy period..." See Exhibit "E".

17 54. The *Unit-Owners'* First Amended Complaint alleges that "[p]laintiff only became
18 sufficiently aware of the defects and damages...through damage that arose after the time of
19 purchase and as a result of complex inspections and intrusive testing performed by expert
20 consultants." See Exhibit "C", ¶ 33.

21 55. The complex inspections and intrusive testing performed by expert consultants on
22 the subject property occurred, on information and belief, in May of 2007. See Exhibit "D",
23 Attachment 3.

24 56. Amerisure's Policies issued to Summit were effective from December 31, 2004 to
25 September 20, 2005. See Exhibits "E" & "F".
26
27
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1 57. Amerisure's Policies expired nearly twenty (20) months prior to the manifestation
2
3 of any alleged "property damage" at the project. *See* Exhibits "E" & "F".

4 58. Assuming arguendo that the First Amended Complaint alleges "property damage"
5 caused by an "occurrence," which Amerisure denies, such alleged "property damage" initially
6 manifested nearly two (2) years after the expiration of the Amerisure Primary and Umbrella
7 Policies. Thus, any alleged "property damage" occurred outside of the Amerisure policy period
8 and does not trigger Amerisure's duties and/or obligations under Coverage A of the Primary and
9 Umbrella Policies.
10

11 COUNT II

12 (COVERAGE A – NO "PROPERTY DAMAGE" OR 13 "BODILY INJURY" CASUED BY AN "OCCURRENCE")

14 59. Amerisure incorporates the allegations set forth within Paragraphs 1 through 58
15 as if fully set forth herein.

16 60. The *Unit Owners'* First Amended Complaint does not seek to recover for any
17 alleged damage to other property, but rather, seeks to recover for alleged damage to the subject
18 property itself as a result of Summit's defective construction and faulty workmanship. *See*
19 Exhibits "B" & "C".
20

21 61. Amerisure previously reserved its rights regarding a possible lack of coverage to
22 Summit for the *Unit Owners'* lawsuit under Coverage A. *See* Exhibits "G", "H", & "I".
23

24 62. Pleading in the alternative, if the Court does not absolve Amerisure of its duties
25 and obligation under Coverage A by determining that all alleged damage and/or injury as
26 contained in the *Unit Owners'* First Amended Complaint first manifested outside of the
27 Amerisure policy period, Amerisure is not obligated to indemnify Summit for the Unit Owners'
28 lawsuit, insofar as the allegations of the *Unit Owners'* First Amended Complaint fail to allege

1 “bodily injury” and/or “property damage” caused by an “occurrence” as those terms are defined
 2 under the Amerisure’s policies. *See* Exhibits “E” & “F”.
 3

4 COUNT III

5 (NO COVERAGE UNDER THE “CONTRACTORS PROFESSIONAL 6 SERVICES LIABILITY COVERAGE ENDORSEMENT”)

7 63. Amerisure incorporates the allegations set forth within Paragraphs 1 through 62 as
 8 if fully set forth herein.

9 64. The “Contractors Professional Services Liability Coverage Endorsement” states
 10 that “[t]his insurance applies only if the damages arise out of a ‘negligent act’ . . .” *See* Exhibit
 11 “E”.⁴
 12

13 65. “Negligent act,” as defined under the Amerisure Primary Policy, means an error or
 14 omission by the insured arising out of the performance of or failure to perform “Contractors
 15 Professional Services”, including “Design Services” and “Construction Management Services.”
 16 *See* Exhibit “E”, Endorsement No. C.
 17

18 66. On information and belief, Summit was neither the design professional, nor a part
 19 of the design team associated with the subject property, and thus, did not it engage in any action
 20 which qualifies as a “negligent act,” as that term is defined in the Contractors Professional
 21 Services Liability Coverage Endorsement. *See* Exhibit “E”.
 22

23 67. Rather, the *Unit Owners’* First Amended Complaint seeks damages to the subject
 24 property allegedly resulting from Summit’s defective construction and faulty workmanship. *See*
 25 Exhibit “C” & “E”.

26 68. Thus, insofar as the Unit Owners do not seek damages and/or relief against
 27

28 ⁴ The Amerisure Umbrella Policy issued to Summit does not contain the Contractors Professional Services Liability Coverage Endorsement

Summit arising out of a “negligent act,” as that term is defined under the Amerisure Primary Policy, the Unit Owners’ claims against Summit do not fall within the ambit of the Contractors Professional Services Liability Coverage Endorsement. *See* Exhibit “E”.

COUNT IV

(COVERAGE A – APPLICABLE EXCLUSIONS)

69. Amerisure incorporates the allegations set forth within Paragraphs 1 through 68 as if fully set forth herein.

70. The *Unit Owners’* First Amended Complaint seeks damages allegedly resulting from defective construction and faulty workmanship at the subject property. *See* Exhibit “C”.

71. Amerisure previously reserved its rights regarding a possible lack of coverage to Summit for the *Unit Owners’* lawsuit under Coverage A. *See* Exhibits G”, H”, & “I”.

72. Pleading in the alternative, if the Court determines that the underlying lawsuit alleges “property damage” caused by an “occurrence” and if this Court does not absolve Amerisure of its defense obligation by determining that all damage and/or injury alleged in the *Unit Owners’* First Amended Complaint first manifested outside of the Amerisure policy period, Amerisure is not obligated to indemnify Summit in connection with the *Unit Owners’* lawsuit under Coverage A of the Amerisure Policy for the following reasons:

- a. Coverage for the claims asserted in the *Unit Owners’* lawsuit is excluded by the “Expected or Intended Injury” exclusion;
- b. Coverage for the claims asserted in the *Unit Owners’* lawsuit is excluded by Exclusion j(5), “Damage to Property”;
- c. Coverage for the claims asserted in the *Unit Owners’* lawsuit is excluded by Exclusion j(6), “Damage to Property”;

- d. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded by the "damage to your work" exclusion;
- e. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded by the "Fungi or Bacteria" exclusion;
- f. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded, in whole or in part, by the absolute pollution exclusion;
- g. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded by the "professional services" exclusion; and
- h. To the extent Summit has failed or fails to "[c]ooperate with [Amerisure] in the investigation or settlement of the claim or defense against the "suit," or has incurred costs or expenses or assumed any obligation without Amerisure's consent, Coverage under the Amerisure policies is unavailable.

See Exhibit "E".

73. The allegations of the *Unit Owners'* First Amended Complaint implicate one, if not several, of the defenses listed in this Count IV. Thus, Amerisure owes no obligation to indemnify Summit in connection with the *Unit Owners'* lawsuit for the reasons set forth herein.

COUNT V

(CONTRACTORS PROFESSIONAL SERVICES LIABILITY COVERAGE ENDORSEMENT - APPLICABLE EXCLUSIONS)

74. Amerisure incorporates the allegations set forth within Paragraphs 1 through 73 as if fully set forth herein.

75. The *Unit Owners'* First Amended Complaint seeks damages allegedly resulting from defective construction and faulty workmanship at the subject property. See Exhibit "C".

1
2 76. Amerisure previously reserved its rights regarding a possible lack of coverage to
3 Summit for the *Unit Owners'* lawsuit under Coverage E. See Exhibits "G", "H", & "I".

4 77. Pleading in the alternative, even if the Court does not determine the inapplicability
5 of "Contractors Professional Services Liability Coverage Endorsement" or determines that any
6 "negligent act" committed by Summit occurred within the Amerisure policy period, Amerisure is
7 not obligated to indemnify Summit for the *Unit Owners'* lawsuit under the "Contractors
8 Professional Services Liability Coverage Endorsement" by application of the following
9 exclusions:
10

- 11 a. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded
12 by Exclusion a., "[d]amages arising out of a: (1) Dishonest; (2)
13 Fraudulent; (3) Criminal; or (4) Malicious; act, error or omission
14 committed by or at the direction of the insured";
15
16 b. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded
17 by Exclusion b., "[d]amages expected, or intended by or at the direction of
18 the insured, or that should have been reasonably foreseen by the insured";
19
20 c. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded
21 by Exclusion k., "[d]amages arising out of express warranties or
22 guarantees"; and
23
24 d. Coverage for the claims asserted in the *Unit Owners'* lawsuit is excluded
25 by Exclusion t., "[f]aulty workmanship, construction or work not in
26 accordance with the design of the project or the construction documents,
27 on projects for which the 'design services' are performed by the insured
28 and any construction, erection, fabrication, installation, assembly,

1 manufacture, or supplying of equipment or materials incorporated therein,
2
3 is wholly or partly performed by: (1) [t]he insured”;

4 See Exhibit “E”.

5 78. The allegations of the *Unit Owners*’ First Amended Complaint implicate one, if
6 not several, of the defenses listed in this Count V. Thus, Amerisure owes no obligation to
7 indemnify Summit in connection with the *Unit Owners*’ lawsuit for the reasons set forth herein.
8

9 **WHEREFORE**, AMERISURE INSURANCE COMPANY and AMERISURE MUTUAL
10 INSURANCE COMPANY request entry of a declaratory judgment in their favor and against the
11 Defendants, finding and declaring that Amerisure has no duty to indemnify Summit in connection
12 with those damages asserted against it in the *Unit Owners*’ lawsuit or in connection with the
13 cross-claim described herein, together with any other further relief this court deems just and
14 proper.
15

16 DATED this 27 day of April, 2010.

17 Respectfully submitted

18
19
20 By: 

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